



Amendi (Suing as the Legal Representative of Ann Wangui Amendi alias Anne Wangui Amedi - Deceased) v Wangugi & another (Environment and Land Miscellaneous Application E007 of 2022) [2022] KEELC 15085 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15085 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E007 OF 2022
YM ANGIMA, J
NOVEMBER 24, 2022

BETWEEN

ANTONY GATHECHA AMENDI (SUING AS THE LEGAL REPRESENTATIVE OF ANN WANGUI AMENDI ALIAS ANNE WANGUI AMEDI - DECEASED) APPLICANT

AND

SIMON GICHUKI WANGUGI 1ST RESPONDENT
UIGUANO NYONJORO FCS 2ND RESPONDENT

(Being an application for leave to appeal out of time against the judgment delivered on January 18, 2022 in Nyahururu CMELC Case No 320 of 2018.)

RULING

1. By a notice of motion dated April 21, 2022 expressed to be based upon sections 1A, 1B, 63(e) & 79G of the [Civil Procedure Act](#) (cap 21), order 42 rule 6, order 50 rules 1 & 3 of the [Civil Procedure Rules, 2010](#) (the Rules), and all other enabling provisions of the law, the applicant sought the following orders:
 - a. Spent;
 - b. Spent;
 - c. That the applicant be granted leave to appeal out of time against the judgment delivered on January 18, 2022 in Nyahururu CMELC Case No 320 of 2018.
 - d. That pending hearing and determination of the proposed appeal against the judgment delivered on January 18, 2022 in Nyahururu CMELC Case No. 320 of 2018, there be a stay of execution of the decree arising therefrom.



- e. That costs of the application be in the cause.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Applicant on April 21, 2022 and the exhibits thereto. It was contended that the 2nd Defendant in the suit before the trial court died on September 20, 2021 and that judgment was delivered on January 18, 2022 posthumously. It was further contended that the applicant became aware of the judgment only on March 20, 2022 by which time the prescribed period for lodging an appeal had already lapsed. The applicant further stated that he took some time in seeking and obtaining a limited grant to enable him file the instant application.
3. The applicant contended that unless the stay sought was granted the title to the suit property might be cancelled and the family members of the deceased evicted during the pendency of the intended appeal. He further contended he and his family members stood to suffer substantial loss because they shall be rendered destitute if evicted before the intended appeal is lodged, heard and determined.

B. The Respondents' Response

4. The 1st respondent filed a replying affidavit sworn on May 30, 2022 in opposition to the said application on several grounds. First, it was contended that the application was unmerited, vexatious and an abuse of the court process. Second, that it was an afterthought and a way of delaying the Respondent's enjoyment of the fruits of his judgment. Third, that there was no evidence of substantial loss to the Applicant in the absence of a stay order since the decree involved cancellation or revocation of title. Finally, the Respondent stated that should the court be inclined to allow the application for stay then it should direct the Applicant to deposit the original title deed in court together with copies of all the documents necessary to transfer the suit property should the intended appeal be unsuccessful.

C. Directions on Submissions

5. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. However, the record shows that the 1st Respondent filed his submissions on July 8, 2022 whereas the Applicant's submissions were not on record by the time of preparation of the ruling.

D. The Issues for determination

6. The court has perused the notice of motion dated April 21, 2022, the replying affidavit in opposition thereto as well as the submissions on record. The court is of the opinion that the following key issues arise for determination:
 - a. Whether the applicant has made out a case for the grant of leave to lodge an appeal out of time.
 - b. Whether the applicant has made out a case for the grant of stay pending appeal.



E. Analysis and Determination

a. Whether the applicant has made out a case for the grant of leave to lodge an appeal out of time

7. In the case of *Mwangi v Kenya Airways Ltd* [2003] KLR 486 it was held that the factors to be considered on an application for leave to appeal out of time are the following:
 - a. The length of the delay.
 - b. The reasons, if any, for the delay.
 - c. Possibly, the chances of the appeal succeeding.
 - d. The degree of prejudice to the Respondent if the application is granted.
8. The court has considered the length of delay in filing the instant application. Whereas the judgment of the trial court was delivered on January 18, 2022, the instant application was not filed until April 22, 2022. The delay was for a period of about 3 months. However, considering that the appeal could have been filed at any time up to and including February 17, 2022 then the period of actual delay could be about 2 months only.
9. The court has further considered the reasons tendered for the delay. It has not been disputed by the Respondent that the 2nd Defendant in the suit before the trial court died on September 20, 2021 and that she was deceased by the time the judgment was delivered on February 18, 2022. The material on record further shows that the Applicant was issued with a limited *grant ad litem* on or about March 29, 2022.
10. Although the Respondent contended that the intended appeal was merely frivolous and vexatious, the court is of the opinion that the merits of the intended appeal should be left to the appellate court during the hearing of the appeal should it see the light of day. Needless to state that every litigant is entitled to exercise his right of appeal within the confines of the law.
11. The court has noted from the 1st Respondent's replying affidavit that he has not indicated what prejudice, if any, he shall suffer should the application be allowed. Apart from the normal delays which arise from the prosecution of appeals, there is no evidence of any other prejudice which the 1st Respondent may suffer if the leave sought by the Applicant is granted.
12. The court is thus of the opinion that there was no unreasonable delay in filing the instant application for leave to file an appeal out of time. The court is further of the opinion that the Applicant has rendered a reasonable and satisfactory explanation for the delay of just over 2 months in filing the application. The court is further of the opinion that the 1st Respondent shall not suffer any significant prejudice if the leave sought is granted. In the premises, the court is of the view that the Applicant has satisfied the requirements for the grant of leave to lodge the intended appeal out of time.

b. Whether the Applicant has made out a case for the grant of stay pending appeal

13. The court has considered the material and submissions on record on this issue. The principles to be considered in granting or refusing an application for stay of execution are stipulated in order 42 rule 6(2) of the *Rules* as follows:

“No order for stay of execution shall be made under subrule (1) unless:-



- a. the court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
14. In the case of *Butt v Rent Restriction Tribunal* [1979] eKLR the Court of Appeal made the following observation with respect to such an application:
- “It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:”
15. It is evident from a copy of the judgment of the trial court that it not only ordered cancellation of the title to the suit property but also ordered the Defendants therein to hand vacant possession of the suit property to the Respondents in default of which they shall be forcibly evicted. The Applicant asserted that her late mother had a house on the suit property and that if an eviction was to be carried out then he and his family members shall be rendered destitute. The employment of the term ‘destitute’ may be an exaggeration but the court is of the opinion that the Applicant has demonstrated the element of substantial loss. An eviction from one’s home inevitably leads to serious disruption of one’s socio-economic life hence the same may constitute substantial loss within the meaning and intendment of order 42 rule 6(2) of the *Rules*.
16. Whereas the court is inclined to grant the Applicant an opportunity to exercise his right of appeal the court must also guard against the risk of the suit property being dealt with or being alienated to the detriment of the successful litigants. Accordingly, the court shall make an order for the deposit of the original title deed in court; make an order for preservation of the suit property; and order provision of security for due performance of any decree which might ultimately be binding upon the Applicant. The court is aware that the Respondents were awarded costs of the suit and that additional costs may be incurred on account of eviction should the instant appeal ultimately fail. Accordingly, the court shall require the Applicant to deposit some money in court to cater for such expenses.

F. Conclusion and Disposal

17. The upshot of the foregoing is that the court is satisfied that the Applicant has satisfied the requirements for the grant of the orders sought. Accordingly, the court makes the following orders for disposal of the said application:
- a. Leave be and is hereby granted to the Applicant to file his intended appeal out of time within 14 days from the date hereof in default of which the leave shall lapse automatically.
 - b. The Applicant is hereby granted a stay of execution of the decree and judgment of the trial dated January 18, 2022 in Nyahururu CMELC 320 of 2018 for a period of 2 years from the date hereof or until the hearing and conclusion of the appeal, whichever comes first.
 - c. The appellant shall deposit the original title deed for Title Nos. Nyandarua/Ndaragwa Kianjogo Block II (Nyonjoro)/141 and 175 in court within 21 days from the date hereof.



- d. An order of inhibition under section 68 of the [Land Registration Act, 2012](#) be and is hereby made to prevent any dealings with the suit properties, that is, Title Nos Nyandarua/Ndaragwa Kianjogu Block II (Nyonjoro)/175 and 141 for a period of 2 years from the date hereof or until the disposal of the appeal, whichever comes first.
- e. The Applicant shall deposit in court a sum of Kshs 200,000/= as security for due performance of the decree within 30 days from the date hereof should the intended appeal ultimately fail.
- f. In the event of the Applicant defaulting in compliance with Order (c) and (e) above, the stay granted shall lapse automatically.
- g. Costs of the application shall be costs in the appeal.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 24TH DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Mungai holding brief for Mr. Gakuhi Chege for the Applicant

N/A for the 1st Respondent

N/A for the 2nd Respondent

C/A - Carol

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YM ANGIMA

JUDGE

